

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 19, 2013

**Diane M. Fremgen
Clerk of Court of Appeals**

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP1180

Cir. Ct. No. 2005CV10416

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**COLLEEN LEMBERGER, INDIVIDUALLY AND AS PERSONAL
REPRESENTATIVE OF THE ESTATE OF STEVEN LEMBERGER,**

PLAINTIFF-RESPONDENT,

v.

HONEYWELL INTERNATIONAL, INC.,

DEFENDANT-APPELLANT,

**ANCHOR PACKING COMPANY, BENDIX COMMERCIAL VEHICLE SYSTEMS,
LLC, METROPOLITAN LIFE INSURANCE COMPANY, OWENS ILLINOIS,
INC., WAHL REFRACTORIES, INC., PRICE VIKING, HENNES
SERVICES, INC., ZIEN MECHANICAL CONTRACTORS, INC., DAWES
RIGGING AND CRANE RENTAL, INC., LTG TECHNOLOGIES, INC.,
EMPLOYERS INSURANCE COMPANY OF WAUSAU, GENERAL PATTERN
CO., INC., THE HOLMING CO., THE SCHOFIELD CORP., THIEM
CORP., TRAVELER'S CASUALTY AND SURETY CO., WISCONSIN
BRIDGE AND IRON CO. AND GENERAL MOTORS CORPORATION,**

DEFENDANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Reversed and cause remanded with directions.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Honeywell International, Inc., appeals from a judgment of the circuit court, entered upon a jury’s verdict but amended by the circuit court. Honeywell raises several challenges to the amended verdict but, ultimately, we conclude that the circuit court should not have altered the jury’s decision. Therefore, we reverse the judgment appealed from and remand this matter to the circuit court with directions to reinstate the original verdict.

BACKGROUND

¶2 Shortly after his high school graduation, Steven Lemberger took a job as a parts driver at Auto Parts & Supply in Milwaukee. His job purportedly involved the occasional shaping of asbestos-containing automotive brakes. Some of these brakes allegedly came from The Bendix Corporation, Honeywell’s predecessor. Lemberger worked at Auto Parts & Supply for approximately twelve months. He took another short-term job elsewhere before joining the Motor Casings Company in 1972, where he worked until 2005. Lemberger also smoked at least two packs of cigarettes a day for thirty-five years.

¶3 In May 2004, Lemberger was diagnosed with advanced lung cancer. He was successfully treated for that cancer until August 2005. In August 2005, Lemberger suffered a perforated bowel. Testing of the tissue produced results “compatible” with mesothelioma. Treatment for that disease was unsuccessful, and Lemberger died on November 4, 2005.

¶4 Lemberger's wife, Colleen, filed this wrongful death action against multiple defendants on November 22, 2005. Her second amended complaint alleges, in relevant part, two theories of products liability: negligence, because "[i]t was reasonably foreseeable" that Lemberger and others would be working near defendants' asbestos-containing products, and strict liability, because the defendants' products "were defective and unreasonably dangerous at the time they left the possession or control of defendants[.]"

¶5 According to Honeywell, Ms. Lemberger did not, during discovery, identify any witness who could testify that her husband had been exposed to asbestos-containing brakes manufactured by Bendix while he was employed at Auto Parts & Supply. In response to Honeywell's motion for summary judgment, Ms. Lemberger identified Andrew Pozorski, whose employment at Auto Parts & Supply had overlapped with Lemberger's for four months. Five weeks before trial, Honeywell identified three witnesses who would rebut Pozorski's claims. On the day of trial, Ms. Lemberger claimed surprise and moved to strike Honeywell's three witness. The circuit court granted the motion on fairness grounds, despite acknowledging that that three witnesses would shed a great deal of light on Ms. Lemberger's claims.

¶6 Trial began on July 14, 2008, with only five defendants remaining, and one of those settled after voir dire. When he testified, Pozorski conceded that Bendix brakes were not stocked in the store and that he had no recollection of ever seeing Lemberger grind one. There was also competing testimony regarding the roles that lung cancer and mesothelioma played in Lemberger's death.

¶7 Honeywell moved for a directed verdict twice: once at the close of Ms. Lemberger's case, and once at the close of all evidence. It contended that

Pozorski's testimony was speculative at best about Lemberger's exposure to Bendix products, so Ms. Lemberger had failed to show the Bendix products were a substantial factor in his illness. The trial court denied both motions.

¶8 The special verdict, drafted by the circuit court, contained fifteen questions. The jury returned a verdict finding damages of \$1,058,191 for Lemberger's various injuries, plus \$75,000 for Ms. Lemberger's loss of companionship. However, the jury also found Lemberger more negligent on both theories than any of the individual defendants, which Honeywell claims meant there was a "take nothing" verdict.

¶9 Both Ms. Lemberger and Honeywell filed postverdict motions. Ms. Lemberger sought to change the jury's answers to verdict questions 5-7 and 10-12.¹ She also asked for additur to the jury's awards for her husband's medical expenses, funeral expenses and lost wages, and for her loss of his household services. Honeywell asked the trial court to change the jury's answers to questions 2, 3, and 9. It alternatively asked the trial court "to effectuate the bar to recovery" in light of the jury's apportionment of negligence. The trial court denied Honeywell's motion but granted most of Ms. Lemberger's.

¶10 The first set of questions deals with the negligence theory. The jury, in question 4, had determined that Honeywell was "negligent with respect to exposing Mr. Lemberger to asbestos[.]" In question 5, the jury determined that Lemberger himself was also "negligent with respect to exposing [him] to asbestos[.]" In question 6, the jury determined that yes, Lemberger's negligence

¹ Ms. Lemberger actually sought to change the answers to eleven of the fifteen questions, but this appeal focuses only on the six mentioned above.

was a cause of [his] death[.]” In question 7, the jury was told to assume “the total conduct causing Mr. Lemberger’s death you found in Question Nos. 4 and 6 to be 100%,” and to apportion responsibility among the actors the jury had found responsible. The jury assigned Lemberger the most responsibility, forty percent, and held Honeywell only five percent responsible.

¶11 The second set of questions relates to the strict liability theory. Question 10 asked the jury, “Was Mr. Lemberger negligent with respect to his own safety?” The jury answered “yes,” so it then had to answer question 11: “Was Mr. Lemberger’s negligence a cause of his death?” The jury answered “yes” to that question as well. Question 12 had the jury assume “that Mr. Lemberger’s death was caused only by the defective condition of brake shoe linings and Mr. Lemberger’s negligence,” and directed it to distribute responsibility between those two things. The jury concluded the brakes were twenty-five percent responsible for Lemberger’s death, and he was seventy-five percent responsible.

¶12 The trial court changed the jury’s answer in question 5 from “yes” to “no,” concluding that there was no evidence Lemberger was negligent with respect to his asbestos exposure. It then vacated the jury’s answer to question 6 regarding Lemberger, because the verdict form indicated the question should not be answered if the answer to question 5 was “no.” As the answer to question 6 was vacated, the trial court redistributed Lemberger’s forty percent negligence from question 7 among the remaining parties, raising Honeywell’s negligence to eight and one-third percent.

¶13 The trial court also changed the answer to question 10 regarding Lemberger’s negligence with respect to his own safety from “yes” to “no,”

concluding the jury might have misconstrued the question. The trial court then vacated the jury's answers to questions 11 and 12, because both of those required question 10 to have been answered affirmatively.

¶14 The only amount of damages that the circuit court altered was the amount for funeral costs, increasing it from \$8000 to \$8191, as supported by the evidence. Additionally, the trial court made Honeywell jointly and severally liable with General Motors, even though the jury found General Motors eighty percent responsible and Honeywell only twenty percent responsible on the strict liability question.

¶15 On appeal, Honeywell raises four issues: (1) whether the circuit court erred in refusing to grant Honeywell a directed verdict in light of the speculative nature of Pozorski's testimony about Lemberger's exposure to Bendix brakes; (2) whether the circuit court erred in excluding Honeywell's three rebuttal witnesses because Ms. Lemberger had actually known about them well ahead of time and was feigning surprise; (3) whether the circuit court erred in disregarding the jury's conclusion that Lemberger was primarily responsible for his own death and in rewriting the verdict; and (4) whether it was error to hold Honeywell jointly and severally liable with General Motors. We conclude that the circuit court erroneously rewrote the verdict, and that our reversal on that issue is dispositive of the appeal, so we address only that issue and do not reach the others. *See State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514, 520 (Ct. App. 1989) (We decide cases on the narrowest possible grounds.).

DISCUSSION

I. Standard of Review

¶16 “In considering a motion to change the jury’s answers to the questions on the verdict, a trial court must view the evidence in the light most favorable to the verdict and affirm the verdict if it is supported by any credible evidence.” *Richards v. Mendivil*, 200 Wis. 2d 665, 671, 548 N.W.2d 85, 88 (Ct. App. 1996). ““If there is any credible evidence which under any reasonable view fairly admits of inferences which support the jury’s verdict, the verdict must be sustained, and neither the trial court nor this court may tamper with it.”” *Balz v. Heritage Mutual Insurance Co.*, 2006 WI App 131, ¶22, 294 Wis. 2d 700, 717, 720 N.W.2d 704, 712 (citation omitted).

¶17 In reviewing the trial court’s order changing a jury’s answers, we afford “considerable respect [to] the trial court’s better ability to assess the evidence.” *Richards*, 200 Wis. 2d at 671, 548 N.W.2d at 88. However, we may overturn the trial court’s decision to change the jury’s answers if it is evident the trial court was “clearly wrong.” *Id.*, 200 Wis. 2d at 671–672, 548 N.W.2d at 88 (citation omitted). A trial court that overturns a verdict supported by any credible evidence is clearly wrong in doing so. *See Weiss v. United Fire and Casualty Co.*, 197 Wis. 2d 365, 389, 541 N.W.2d 753, 761 (1995). If there is any credible evidence to support the jury’s verdict, even if it is contradicted and the contradictory evidence is stronger and more convincing, the verdict must stand. *Id.*, 197 Wis. 2d at 389–390, 541 N.W.2d at 761–762.

II. The Trial Court's Rulings

A. The Negligence Questions

¶18 Ms. Lemberger's wrongful death action against Honeywell is premised, in part, on negligence in the products liability context. The test for that kind of negligence "is whether the conduct foreseeably creates an unreasonable risk to others." See *Bittner v. American Honda Motor Co., Inc.*, 194 Wis. 2d 122, 148, 533 N.W.2d 476, 486 (1995). Ms. Lemberger had thus alleged, in part, that it was "reasonably foreseeable" that Lemberger and other would work with defendants' products and be exposed to airborne asbestos fibers that defendants knew or should have known cause disease and/or death.

¶19 With regard to the special verdict, the jury first concluded that mesothelioma was a cause—not *the* cause—of Lemberger's death, that Honeywell caused Lemberger to be exposed to asbestos, that such exposure was a cause of Lemberger's death, and that Honeywell was negligent with respect to so exposing Lemberger. Then, in question 5, as written on the verdict form, the jury was asked whether Lemberger was "negligent with respect to exposing Mr. Lemberger to asbestos." The jury answered "yes".

¶20 In changing the jury's answer to question 5 from "yes" to "no," the trial court explained that the jury "was instructed to consider only a particular aspect of Mr. Lemberger's conduct, that is, his conduct with regard to the use of asbestos-containing products and with regard to his exposure to asbestos generally.... [E]vidence that Mr. Lemberger smoked is not evidence of contributory negligence."

¶21 However, the trial court also expressed a concern that the jury perhaps had “misconstrued the questions on the special verdict, and assigned contributory negligence to Mr. Lemberger based on his smoking habit, even though the instructions directed the jury to consider only his conduct concerning asbestos[.]” It noted that questions 5 and 6 were “framed in terms merely of negligence as a cause of Mr. Lemberger’s death, in other words, very broadly and without specific reference to asbestos, and therefore, it might have been construed broadly enough by the jury to include any cause of death[.]” It further observed that a portion of the instructions for questions 5 and 6 “if read out of context might suggest that the jury is permitted to consider Mr. Lemberger’s negligence in broad scope[.]” Specifically, the trial court noted:

In a separate paragraph set off from the rest of the instructions, the jury is told, “Mr. Lemberger had a duty [to] exercise ordinary care for [his] own safety. A person is not required at all hazards to avoid injury, but a person must exercise ordinary care to take precautions to avoid injury to himself or herself.” This language is rather broad and it doesn’t mention any explicit limitation to injuries from careless involvement with asbestos as opposed to, for example careless use of smoking.

¶22 Accordingly, because the trial court concluded that the jury went astray from the text of question 5—whether Lemberger was negligent with respect to exposing himself to asbestos—it changed the jury’s “yes” answer to “no.” Then, it vacated the corresponding, contingent answers to questions 6 and 7.

B. The Strict Liability Questions

¶23 Verdict questions 10–12 dealt with the strict liability question. “A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.”” *Dippel v. Sciano*, 37 Wis. 2d 443, 456, 155

N.W.2d 55, 61 (1967) (citation omitted). Consequently, questions 8 and 9 had fairly asked the jury to determine whether the Bendix brakes were defective when they left the company and whether that defective condition was a cause of Lemberger's death. The jury answered "yes" to both. Question 10, however, asks whether Lemberger was "negligent with respect to his own safety" and question 11 asked whether said negligence was a cause of his death. The jury answered "yes" to both of those questions as well.

¶24 In changing the answers to these questions, the trial court explained that, similar to question 5:

[T]he instructions relating to Question No. 10 ... begin rather broadly by stating that the jury "must consider whether Mr. Lemberger was negligent with respect to his own safety, and whether such negligence was a cause of his death." But in the very next sentence, the instruction directs the jury to consider that "Mr. Lemberger had the duty to exercise ordinary care for his own safety when using the defendants' products[.]" ...

....

[But] Question No. 10 asks merely whether Mr. Lemberger was negligent with respect to his own safety. It doesn't mention asbestos specifically, and does not target his conduct as it related to some use or exposure to -- I should say use of or exposure to the defendant's allegedly defective products.

Smoking is without doubt unsafe and would seem to implicate what the question asks about, that is "negligence with respect to his own safety." Mr. Lemberger's smoking habit taken alone and without regard to the instructions may well have motivated the jury to answer "yes" to Question No. 10.

¶25 Thus, because the trial court concluded that the jury had failed to follow the instruction, it changed the jury's answer to question 10—whether

Lemberger was negligent with respect to his own safety—from “yes” to “no.” It then changed the corresponding contingent answers for questions 11 and 12.

III. Analysis

¶26 Contributory negligence is a legitimate defense to both the negligence and strict liability causes of action for wrongful death. *See Richards v. Badger Mutual Insurance Co.*, 2008 WI 52, ¶26, 309 Wis. 2d 541, 556, 749 N.W.2d 581, 589 (negligence); *Austin v. Ford Motor Co.*, 86 Wis. 2d 628, 643, 273 N.W.2d 233, 239 (1979) (strict liability). The comparison to be made, particularly in the strict liability context, is negligence causative of death, not causative of the accident—which, in this case, is the occurrence of the mesothelioma. *Austin*, 86 Wis. 2d at 643, 273 N.W.2d at 239.

¶27 Here, it is evident that in the context of both the verdict questions and the jury instructions, the jury believed itself charged with the task of determining the extent to which mesothelioma and/or lung cancer caused by smoking played a role in Lemberger’s death. The jury, believing itself so charged, returned verdict answers expressing an internally consistent conclusion that Lemberger’s smoking caused lung cancer and that the lung cancer was more responsible for his death than the mesothelioma. Such conclusion is adequately supported by the evidence of Record.

¶28 The trial court appears to believe that the jury was led astray by the verdict and instructions. However, if the trial court, upon receiving the verdict from the jury and previewing it, thought that the answers reflected confusion by the jury, it could have asked the jury to continue or reconsider its deliberations, or it could have ordered a new trial. *See Westfall v. Kottke*, 110 Wis. 2d 86, 96–98, 328 N.W.2d 481, 487–488 (1983). It should not, however, have rewritten the

jury's answers to follow clearer instructions that were not given or to answer clearer questions that were not asked. Accordingly, we reverse the judgment and remand to the circuit court with instructions to enter judgment on the verdict as returned by the jury.

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

